No. 8450

In the

Circuit Court of Appeals

of the

United States of America

in and for the

Ninth District

ANNIE E. WINSLOW, and ANNIE E. WINSLOW, as Administrax of the Estate of Lorenzo N. Winslow, Deceased,
Appellants,

—VS.—

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Appellee.

OPENING BRIEF OF APPELLANTS

FILED
MAR 20 1937
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before signing it. and did not know of the company's directions to and requirements of its agents in such matters; that it was the negligence, mistake, or inadvertance of the agent that caused the failure to comply with the company's instructions, and by reason thereof the company is estopped from denying liability herein; that the business practices of the company and its said agent and the various and successive steps taken by the agent made effective on that date, the insurance applied and paid for by Winslow. Such evidence standing unrefuted, the Court erred in directing verdict and judgment for defendant. 17

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Appellants,

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THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee.

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JURISDICTION.

Suit was originally filed in the Superior Court of Humboldt County, State of California, and upon proceedings duly taken upon motion of defendant and appellee herein, a New York corporation, was transferred to the United States District Court, Northern Division of Northern District of California (Trans. 1-3).

U. S. C. A. Title 28, Sec. 71 Judicial Code.

PLEADINGS.

The amended complaint (Trans. page 4-14) sets forth two causes of action; the first alleges an oral contract made on December 14, 1934, to then and there insure the life of Leonard N. Winslow for the sum of $5,000.00 payable to his parents, plaintiffs herein, or the survivor of them, with double indemnity in case of accidental death; that $100.00 was paid on account of premium and balance of $153.50 to be paid when policy was issued; that said insured died on December 18, 1934, by reason of injuries sustained in an automobile accident; the second cause of action alleges a contract of insurance entered into between Fred J. Moore, agent of defendant Company and Leonard N. Winslow for the amounts above stated, effective immediately and the applicant paid on account of premium the sum of $100.00, and agreed to pay the balance due thereon within sixty days; that the agent filled in all the application blanks as to questions answered that were filled in and that the applicant never read nor had he any opportunity to read the application, and the same through carelessness of the agent, was sent in to the San Francisco office of the insurance company without applicant's signature; that the application was returned to the agent to procure the applicant's signature, which was done without the applicant reading the same; that the agent, through inadvertance, mistake, or neglect failed to issue to applicant the form of special receipt referred to in paragraph 14 of said application or to fill in any part of said paragraph; that the applicant did everything that was required of him to make the insurance effective immediately and had no notice or knowledge of any limitations or in-

structions contained in the application or instructions to agents; that applicant's application was approved as to medical, both in Eureka and at the home office; and that the company is estopped from denying liability herein. A full statement of the facts is set forth in the Amended Complaint (Trans. 7-13) and hereinafter pages
By amendment the word "oral" was stricken from the second cause of action (Trans. p. 28). It was admitted that if plaintiff is entitled to recover at all it would be for the sum of $10,000.00 (Trans. page 28).

The answer alleges that applicant signed a written application for insurance which contained certain conditions and limitations on the agent's authority and right to make or modify any contract, sets forth a copy of the application as signed, and claims that by reason or failure to observe the same no liability exists herein (Trans. p. 15-20).

The court on motion of defendant directed the Jury impaneled to try the cause to return a verdict for the defendant. (Trans. p. 87); Judgment was entered upon said verdict (Trans. p. 22-23); and petition for appeal, assignment of errors filed (Trans. 24-25) and Order made allowing appeal. (Trans. p. 26-27).

STATEMENT OF FACTS

Fred J. Moore was at the time of the trial of this cause, and for more than sixteen years continually prior thereto had been the representative of defendant Company in Humboldt County, California, and was well acquainted with Leonard Winslow, and his parents (Trans. p. 28-29).

On December 14, 1934, Fred J. Moore suggested to said Leonard Winslow at Eureka, that he take out another

policy in his Company. Moore had on two occasions shortly prior thereto suggested the same thing, but Winslow seemed not sufficiently interested (Trans. p. 29, 30). Winslow was on date mentioned anticipating a trip to San Francisco (Trans. p. 30), and stated that if he took out any insurance he wanted it to take effect immediately (Trans. p. 36). Winslow paid $100.00 on account of premium which was more than the amount necessary to pay a quarterly premium installment of $67.50 (Trans. p. 35-37). Moore told him the quarterly rate would be $67.20 and to start it he (Winslow) wanted it put on a quarterly basis. They discussed making the insurance effective immediately and Moore told him if the quarterly premium was paid in full, assuming the medical examination and inspection were satisfactory, his policy would be in force immediately. It was the applicant's thought that the insurance would go into force immediately, and that is what Moore believed was wanted. (Trans. 36). Moore stated to him that he could save 6 per cent by paying the premium on an annual basis (Trans. p. 82); that he could pay the remaining amount due, $153.50 within sixty days and he could take the Doctor's examination that day, and if he passed, he would be insured from that day (Trans. 36, 82).

Moore produced an application blank and filled in all answers that were written on the upper half of the application blank. Winslow did not read the questions nor the answers filled in by Moore, nor did he sign the application that day (Trans. p. 33-4).

Winslow was then directed to go to Dr. E. J. Hill of Eureka, for his physical examination, who filled in the an-

swers to the medical questions and forwarded the application blank to the San Francisco office of defendant. (Trans. p. 31).

Winslow withdrew $100.00 from his savings bank account and paid the same to Moore, who gave him an ordinary receipt (Plaintiff's Ex. 1), and which admittedly is not the form referred to in Paragraph 14 of the application.

A few days later the upper half of the blank was returned to Moore with request that he secure Winslow's signature thereto. (Trans. p. 45 and 46). Moore found Winslow at his work and told him that he (Moore) had forgotten to have him (Winslow) sign the application that had been filled in a few days before, and Winslow, again without reading it, signed his name thereto. (Trans. page 33).

Moore returned the application blank to the San Francisco office of defendant, with a memorandum attached, stating "Sorry my carelessness delayed this 'app' going to H. O." (Trans. p. 46).

This application and memorandum was received in the San Francisco office December 18, 1934, and by it forwarded to the New York office where it was received on December 20th. (Trans. p. 46, 47, 57).

The policy to be issued was to be acted upon so as to make it effective as of the age of 23 years for applicant. (Trans. p. 34 and p. 58).

The Home office stamped on the back of the application under "Date of issue" two dates, one of November 20, 1934, the other December 21, 1934. (Trans. p. 57).

Further record entries on the back of the application in-

dicate that it was approved by the Home Office Medical Department on December 20, 1934. (Trans. p. 62).

Winslow was killed in a truck collision on December 19, 1934 (Trans. p. 28) and the following day Moore notified the San Francisco office by wire of this fact. The San Francisco office in turn, and on the same day wired the New York office the same facts. (Trans. p. 56).

It was admitted by the defendant Company that their agents, such as Moore, had authority to tell prospective insureds as a part of their statement to the insured that "this policy can be made effective immediately" (Trans. p. 53); that there are instances when the insured desire such a particular form of policy; and that the Company then leave it to their agent to accept the premium and issue the receipt. (Trans. p. 54).

Moore testified that Winslow did not read or know of the contents of said Paragraph 14, nor of any of the instructions given by the Company to its agents in its printed manuals. (Trans. p. 35 and 40). Moore testified that he had authority to make insurance effective as of date of application. (Trans. p. 38). Winslow did not give any untruthful answers to questions that Moore asked with reference to the application; and he complied with all requests made by Moore, and there was nothing more for Winslow to do to make the policy effective immediately (Trans. p. 39). Winslow had no information from Moore as to type of receipt issued by agents of this Company (Trans. p. 39). Moore did not hand applicant for reading or inspection any documents that might contain rules or regulations of the company with reference to issuance of policies (Trans. 40). Moore had the applica-

tion blank, filled it in, and on its return from San Francisco, had Winslow sign it without ever having read the upper part of it (Trans. p. 40). The balance of the premium as indicated on the receipt was $153.50 which Winslow agreed to pay in sixty days (Trans. p. 40). This amount was tendered to the agent within the sixty day period. (Trans. p. 41).

Moore further testified that it was his practice in similar cases where the insured applied for and it was agreed to have the insurance effective immediately, to issue the form of receipt that he issued in this instance; (Trans. p. 68); that he did not have the printed form of receipt referred to in paragraph 14, but the office has accepted his receipt on that order and noted in blank 14 the cash had been paid (Trans. p. 68); but the Company had accepted many receipts of the kind issued to Winslow, even though their instructions were different (Trans. p. 68-69); that it was his understanding of the attitude and policy of the company as he has conducted the business for years, that if the risk was the right kind and the medical was passed, the policy would be made effective immediately, even though the applicant died before the policy was issued (Trans. p. 70-71); that if the person paid a certain sum and agreed to pay the balance in sixty days the Company would honor that (Trans. p. 72); that the note or sixty day credit was considered cash; (Trans. p. 78); that similarly had he taken a promissory note for the first premium payment it would have been effective immediately; that a note or credit of sixty days is considered cash (Trans. 78); that he has taken notes, or paid the premium himself; that his closing date with the Company is the 25th day of the

month; this application was written on the 14th and it was his intention to pay it on the 25th (Trans. 79). This would come under Moore's ordinary business relationship or course of business with the Company. (Trans. p. 80). That it was his custom to make his cash settlements with the San Francisco office of the Company on the 25th of each month (Trans. p. 81), and at that time he intended to advance for the insured the balance of premium due over the $100.00 he had collected and sent in; that such basis of settlement was considered by the Company as equivalent to cash and policies had been issued on that basis (Trans. p. 80, 81, 82). Moore sent in $100.00 and had an arrangement or custom with the Company, whereby not later than the 25th of the month he could advance the difference necessary to make the policy immediately and this practice has been followed and approved by the Company in other cases (Trans. p. 82); also that Winslow offered to pay the amount that would be necessary to make the policy effective immediately on a quarterly basis and Moore told him he could make a saving of six per cent by placing it on an annual basis (Trans. p. 82).

It further appears from the printed rules that should the agent violate any of such instructions he is liable to dismissal (Trans. p. 63), but in this instance Moore at all times, after receiving the $100.00 from Winslow, up to and including the time of the trial was still in defendant's employ (Trans. p. 29).

It is plaintiff's contention that the defendant Company is responsible for the inadvertance, mistake, and neglect of its agent in not filling out the application blank and issuing the receipt form it required, in view of the admitted author-

ity of the agent to tell prospective insureds that "this policy can be made effective immediately" and that it is estopped from denying liability because of the negligence of its own agent.

The District Court granted defendants motion for a directed verdict (Trans. page 87) and directed the jury to find a verdict in favor of defendant and further ordered that judgment be entered in favor of said defendant upon such directed verdict (Trans. p. 87).

Defendant contends because of the fact than ot answer was made to, and that no part of the blank space provided in question 14 on the application was filled in, the beneficiaries are precluded from claiming that the insured was to take effect immediately, and that therefore the policy was to be effective only when the policy was delivered to insured during his continuance in good health; that the death of applicant prior thereto precluded such policy becoming effective.

Defendant further contends that because Moore failed to receive the full premium in cash and to issue the conditional receipt called for in its printed instructions it is not bound herein. (Trans. p. 73-74).

THE ASSIGNMENTS OF ERROR ARE AS FOLLOWS:

1. That said Court erred in granting the Motion of said defendant for a directed verdict in favor of said defendant.

2. That said Court erred in directing said Jury in said cause to render a verdict in favor of said defendant.

3. That said Court erred in directing that Judgment be

entered upon said directed verdict in favor of said defendant (Trans. p. 25-26).

THE QUESTION INVOLVED.

Under the facts above stated, was the Company bound by the agreement of the agent that the insurance was to take effect immediately, provided applicant passed his medical, in view of the limitations and provisions contained in the application which were not filled in or complied with, due to the inadvertance, mistake, or negligence of the agent and the practices and customs of the insurer with respect to said agent?

The Argument herein applies equally to each and all of said assignments of error and should be so considered.

ARGUMENT.

IN SECURING THE APPLICATION THE AGENT MOORE WAS ACTING FOR THE COMPANY AND NOT THE APPLICANT; AND THE COMPANY CANNOT ESCAPE LIABILITY BECAUSE OF THE AGENT'S UNSKILFULNESS, MISTAKE, CARELESSNESS OR FRAUD IN FILLING IN THE APPLICATION BLANK OR IN FAILING TO ISSUE THE PROPER RECEIPT.

Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222; 20 L. Ed. 617.

American Life Ins. Co. v. Mahone, 21 Wall. 152; 22 L. Ed. 593.

N. J. Mutual Life Ins. Co. v. Baker, 94 U. S. 610; 24 L. Ed. 268.

Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304; 33 L. Ed. 341.

Bank Sav. Life Ins. Co. v. Butler, 38 Fed. 2nd 972 (8th CCA);
Certiorari denied, 282, U. S. 8501; 75 L. Ed. 753.

2 Couch, Ins. page 1533.

Cooley Briefs on Insurance, 2nd Ed. pages 4106-4165.

81 A. L. R. 835 (note and cases cited).

Irving v. Sunset Mutual Life, 4 Cal. App. 2nd 455, 41 Pac. (2nd) 194.

Pacific Employers Ins. Co. v. Arenbrust, 85 Cal. App. 263; 259 Pac. 121.

Weiss v. Policy Holders L. Ins. Assn. 132 Cal. App. 532; 23 Pac. 2nd 38.

LaMarche v. New York Life Ins. Co. 126 Cal. 498. 58 Pac. 1053.

Vierra v. N. Y. Life Ins. Co. 119 Cal. App. 352; 6 Pac. 2nd 349.

It was specifically shown herein by the testimony of Murray that Moore had authority to tell applicants that the insurance could be made effective immediately provided the medical was satisfactory, and that in such instances and where such insurance was desired by the applicant then the company left it to the agent to see to it that the proper forms of receipt was issued and premium collected. (Trans. p. 53, 54). In fact, paragraph 14 of the application contemplates such immediately effective insurance. Such paragraph is as follows: "Dollars ______ in cash has been paid to the Soliciting Agent, and a con-

ditional receipt No. ______, dated _________________, signed by the Secretary of the Company and countersigned by the Agent, has been issued, making the insurance in force from such date, provided this application shall be approved."

The question, therefore, arises as to whether the failure of the agent, under the circumstances shown herein, to fill in paragraph 14 and issue the form of receipt therein mentioned, and in view of the custom or practice of the company in dealing with the agent and its recognizing such practices, precludes recovery herein.

Appellant claims that under the undisputed facts of this case the failure or neglect of the agent is not chargeable against the insured or his beneficiaries, and that the company is estopped from denying liability herein.

Thus in N. Y. Life v. Abromietes, 254 Mich. 622. 236 N. W. 769, it was held that if the agent neglects or omits to give the receipt required and to see to it that the proper indorsement is made on the application, such neglect is not attributable to the insured and the company is liable, for in securing the application, the agent was acting for the company and not the applicant.

Where the agent failed to get the health certificate on renewal of a policy, the company was still held liable, and the agent's negligence would not relieve it of responsibility.

Hoyle v. Grange Life Assur. Co. 214 Mich. 603 183 N. W. 50.

Similarly, it has been held that the mistake of the agent in filling in the wrong residence in application, is the mistake of the company and is not chargeable to the insured.

Irving v. Sunset Mutual Life, 4 Cal. App. 2nd 455-9. 41 Pac. (2nd) 194.

LaMarche v. New York Life, 126 Cal. 498. 58 Pac. 1053.

The course of business followed by the insurer and its agents may warrant acts in excess of limitations placed upon agents' authority.

The Knickerbrocher Life Ins. Co. v. Norton, 96 U. S. 234; 24 L. Ed. 689.

The instant case is distinguishable from cases cited by insurer in its motion for directed verdict, in that in each of such cases there was no allegation or issue raised that insured had not read the application before signing it, that he had no opportunity to read it, and that he relied upon the agent to do all things necessary in so far as filling in application form and issuing proper receipt was concerned, and that it was the negligence, mistake and inadvertance of the agent that resulted in compliance, if any, with the company's rules. In the absence of such allegations and issue, it would be presumed that the applicant read the application and thus become bound thereby; but such cases are not applicable herein.

WHERE THE INSURED IN GOOD FAITH MAKES TRUTHFUL ANSWERS TO QUESTIONS CONTAINED IN THE APPLICATION, BUT THE ANSWERS THROUGH THE FRAUD, MISTAKE, OR NEGLIGENCE OF THE AGENT ARE NOT CORRECTLY TRANSCRIBED, THE COMPANY IS ESTOPPED TO ASSERT THEIR FALSITY. THIS APPLIES WHETH-

ER THE AGENT IS GENERAL, OR SOLICITING OR MEDICAL EXAMINER, AND HE IS AGENT FOR THE COMPANY AND NOT THE INSURED, THOUGH THE APPLICATION OR POLICY SO STIPULATES.

Lyon v. United Moderns, 148, Cal. 470, 475, 83 Pac. 804.

Irving v. Sunset Mutual Life, 4 Cal. App. 2nd 455, 458-9, 41 Pac. (2d) 194.

Joyce on Insurance, Sec. 489.

Cooley's Briefs on Law of Insurance, Vol. 3, p. 2594.

Gayton v. N. Y. Life Ins. Co. 55 Cal. App. 202, 206. 202 Pac. 958.

Westfall v. Metropolitan Life Ins. Co. 27 Cal. App. 734. 151 Pac. 159.

With reference to defendant's claim that applicant is conclusively presumed to have notice of the limitations placed upon the agent by the language of the application and that the applicant cannot assert he did not read it, attention is called to the following language in Vierra v. N. Y. Life Ins. Co. 119 Cal. App. 352, at 360 (6 Pac. 2nd 349).

> "While, as a general rule, a party to a contract . . . will not be permitted to urge that he did not read it before he affixed his signature thereto, and that he was ignorant of its contents, and supposed them to conform to what he had agreed with or represented to the adverse party or his agent, the application of this rule has been almost universally denied where

sought to be applied to the business of insurance as it is conducted in the United States. (Note, 9 A. St. Rep. 232, citing numerous cases, including Menk v. Home Ins. Co., 76 Cal. 50 (9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117).)"

Instances where failure to read the application for insurance was excused are found in:

McKay v. N. Y. Life, 124 Cal. 270, 56 Pac. 1112.

Maxson v. Llewelyn, 122 Cal. 195, 9, 54 Pac. 732.

LaMarche v. N. Y. Life, 126 Cal. 498, 58 Pac. 1053.

The requirements of the Company's rules and instructions to agents cannot bind the insured unless it is shown that the insured had notice or knowledge thereof; and the failure of the agent to comply therewith in making out the application or issuing the receipt is not chargeable to the insured.

Roe v. National Life Ins. Assn., 137 Iowa, 696, 115 N. W. 500.

New York Life Ins. Co. v. Abromietes, 254 Mich. 622, 236 N. W. 769.

Marderosian v. National Casualty Co., 96 Cal. App. 295, 303; 273 Pac. 1093.

Vierra v. New York Life Ins. Co., 119 Cal. App. 352, at 359, et seq; 6 Pac. 2nd 349.

2 Couch Insurance, Sec. 522A.

PAROL EVIDENCE WAS ADMISSIBLE TO SHOW THAT IT WAS AGREED BETWEEN THE INSURED

AND THE AGENT THAT THE POLICY TO BE ISSUED WAS TO TAKE EFFECT IMMEDIATELY, SUBJECT TO PASSING MEDICAL EXAMINATION; THAT THE MATTERS CONTAINED IN QUESTION 14 OF THE APPLICATION WERE NOT CALLED TO APPLICANT'S ATTENTION; THAT THE APPLICANT DID NOT READ THE APPLICATION BEFORE SIGNING IT, AND DID NOT KNOW OF THE COMPANY'S DIRECTIONS TO AND REQUIREMENTS OF ITS AGENTS IN SUCH MATTERS; THAT IT WAS THE NEGLIGENCE, MISTAKE, OR INADVERTANCE OF THE AGENT THAT CAUSED THE FAILURE TO COMPLY WITH THE COMPANY'S INSTRUCTIONS, AND BY REASON THEREOF THE COMPANY IS ESTOPPED FROM DENYING LIABILITY HEREIN; THAT THE BUSINESS PRACTICES OF THE COMPANY AND ITS SAID AGENT AND THE VARIOUS AND SUCCESSIVE STEPS TAKEN BY THE AGENT MADE EFFECTIVE ON THAT DATE, THE INSURANCE APPLIED AND PAID FOR BY WINSLOW. SUCH EVIDENCE STANDING UNREFUTED, THE COURT ERRED IN DIRECTING VERDICT AND JUDGMENT FOR DEFENDANT.

Vance, in his work on Insurance under the title of "Waiver and Estoppel," page 356, lays down the rule as follows:

> "It is clear that there is fraud on the part of the insurer's agent in pretending to make a valid contract when by its terms he knows it to be invalid, and that the insured, if acting in good faith, has been misled

into paying money for a contract which by its terms conferred no benefit whatever upon him."

And the learned author goes on to discuss the question whether the insured can inforce such a contract in an action at law without first reforming it in equity, as follows:

"The whole contest however voluminously waged in the courts narrows itself to this single issue: Does the admission of such evidence have the effect of altering or contradicting a term of the policy and thus violating the parol evidence rule? * * * * In speaking of this famous rule, Justice Miller, in Union Mutual Life Insurance Company v. Wilkinson, 13 Wall. 222, makes the following sound observations: 'The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate and prudent in making their contracts against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which cannot always be produced without fear of change or liability of misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. **The written instrument does not always represent the intention of both parties and sometimes it fails to do so as to either, and where this has been the result of accident, mistake or fraud, the principle has long been recognized that under proper circumstances and in an appropriate proceeding the instrument may be set aside or reformed as**

best suits the purpose of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the 'statute of frauds,' become the instrument of the very fraud it was intended to prevent. In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought and it is not denied that he signed the instrument and that the representation is untrue. But the parol testimony makes it clear beyond a question that the party did not intend to make that representation when he signed the paper and did not know that he was doing so, and in fact had refused to make any statement upon that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself or by some one who was his agent alone in the matter, and forwarded to the principal office of the defending corporation and acted upon as true by the officers of the company,it is easy to see that justice would authorize them to hold him to the truth of the statement and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not after the event be permitted to show his own mistake or carelessness to the prejudice of the corporation.

"If, however, we suppose the party making the

insurance to have been an individual and to have been present when the application was signed, and soliciting the insured to make the contract of insurance, and that the insurer himself wrote out oll these representations and was told by the plaintiff and his wife that they knew nothing at all about this particular subject of inquiry and that they refused to make any statement about it, and, yet knowing all this wrote the representations to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the greatest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff and that the defendant knew that it was not when he made the contact, and that it was made by the defendant who procured plaintiff's signature thereto.

"It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppel or as it is sometimes called estoppel in pais. The principle is that where one party by his representations or his conduct induced the other party to the transaction to give him an advantage which it would be against equity and good conscience for him to assert, he should not, in a court of justice, be permitted to avail himself of that advantage."

And the court goes on to show that the doctrine of equitable estoppel is now applied to a direct action on the contract.

Vance goes on in the following language:

"The modern decisions fully sustain this proposition and they seem to us to be founded in reason and justice and meet our entire approval. This principle does not admit parol testimony to vary or contradict that which is in writing but it goes on the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances as to estop the other side from using it or relying on its contents; not that it may be contradicted by parol testimony but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

"It is believed that nearly all of the states have accepted the doctrine allowing parol proof of facts contemporaneous with the delivery of the policy constituting an estoppel, whereby the insurer is prevented from obtaining the benefit of a term of his written contract, provided that term invalidates the policy in its inception (Citing cases page 362)."

The rule laid down by Vance, as above indicated, is clearly stated in the case of Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617. In that case an action was brought on a life insurance policy. The insurance company raised the defense that the insurance contract was void because the applicant had answered falsely certain material questions in the application which he had signed. By the terms of the policy it became void if any of these representations proved to be untrue. The defendant company objected to the introduction of parol testi-

mony regarding the action of the agent in soliciting the application. This, according to the report, was the very first question raised by the attorneys for the insurance company in their brief. They said the question to be discussed is: "Had the Court and jury under any pretense whatever any right to take into evidence the parol statements made by the applicant or others which were contemporaneous with the signing of the application?" They go on and say: "We have this anomalous position in a court of law. The plaintiff sues on a written contract signed by himself as one of the parties. He asks a recovery according to the terms of that contract and yet in the same breath is permitted by the court to contradict and vary the terms of this written contract by proving what was stated by himself and others at and before the signing of the same." The Supreme Court of the United States, speaking thru Justice Miller, overruled these objections in the language stated in the excerpt from Vance quoted above. The Court then continues:

> "Whose agent was Ball in filling up the application? . . . It is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one state and having in that state its principal business office send these agents all over the land with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and the necessity of life insurance and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on

the premiums thus obtained and the policies are delivered at their hands to the insured. The agents are stimulated by letters and instructions to activity in procuring contracts and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said and done in making the contract. Has he not the right so to regard him? It is quite true that the reports of judicial decisions are filled with the efforts of those companies, by their counsel, to establish the doctrine that they can do all of this and yet limit their responsibility for the acts of these agents to the simple receipt of the premiums and delivery of the policy, the argument being that as to all the other acts of the agent he is the agent of the insured. This proposition is not without support in some of the earlier decisions on this subject, and at a time when insurance companies waited for parties to come to them to seek insurance or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to a system of selling policies thru agents which we have described would be a snare and delusion leading as it has done in numerous cases, to the grossest frauds of which the insurance corporations received the benefits, and the parties, supposing themselves insured, are the victims. The tendency of the modern decisions in this country is steadily in

the opposite direction. **The powers of the agents are, prima facie, co-extensive with the business intrusted to their care and will not be narrowed by limitations not communicated to the person with whom he deals (Citing cases.) An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceeded from the principal. (Citing cases.)"**

This case was approved in the later decisions of the Supreme Court of the United States. See American Life Insurance Company v. Mahone, 21 Wall. 152, 22 L. Ed. 593.

The same rule was laid down in N. J. Mutual Life Ins. Co. v. Baker, 94 U. S. 610, 24 L. Ed. 268, and Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. Ed. 341.

In the case of Association v. Wickham, 141 U. S. 564, and cited with approval by the Circuit Court of Appeals of the Ninth Circuit in the case of McElroy v. British American Assurance Company, 94 Fed. 990, the court said:

"We have no disposition to overrule or qualify in any way the general rule and familiar doctrine, in forced by this court from the case of Hunt v. Rousmanier's Admrs., 8 Wheat. 174, decided in 1823, to that of Seitz v. Refrigerator Co. (decided at the present term), 141 U. S. 510, that parol testimony is not admissible to vary, contradict, add to or qualify the terms of a written instrument. The rule, how-

ever, is subject to numerous qualifications as well established as the general principle itself, among which are that such testimony is admissible to show the circumstances under which the instrument was executed." (Citing Ins. Co. v. Gray, 43 Kas. 497, 23 Pac. 637, and other cases).

"In the McElroy case, supra, the court said, speaking thru Judge Morrow: **'The insured had a right to rely upon the agent performing his duty of making his contract in conformity with the information given and the agent's failure so to do, whether the result of a mistake or a deliberate fraud, cannot operate to the prejudice of the insured.'** The contract of insurance is pre-eminently one that should be characterized by good faith on both sides. * * * * In Kister v. Insurance Company, 128 Pa. St. 553, 18 Atl. 447, a policy was issued upon an application in which the agent had written down other answers than those given him by the applicant and the insured signed the application in ignorance of this fact. The Supreme Court said: "A copy of this application accompanied the policy and it is argued that Kister (insured) could and ought to have read it and if he had done so he would have seen that the answers were untrue. These are considerations which were properly addressed to the jury. We cannot say that the law, in anticipation of a fraud on the part of the company, imposed any absolute duty upon Kister to read the policy when he received it, altho it would have been an act of prudence to have done so.' (Citing cases). **One**

> **thing is certain, however; the company cannot repudiate the fraud of the agent and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination.** Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant decided to make it anything different it should, in order to make it binding upon plaintiff, under the authorities in this state, have called his attention to those clauses which differed from the oral application."

In the recent Federal case of Campbell vs. Business Men's Assn., 31 Fed. (2nd) 571, and decided in May, 1928, and which was an action on a life and health insurance policy, the insurance company contended that there was a misrepresentation of fact in the application made by the insured in this: That he had answered "No" to a question as to whether he had previously been rejected for insurance when as a matter of fact he had been rejected. It appeared as a fact in the case that the agent wrote the application. The court said in discussing the case:

> "The applicable and controlling rule in such cases was announced in Union Mutual Life Ins. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, quoting from said decision as follows: 'Hence when these agents in soliciting insurance undertake to prepare the applications of the insured or make any representations to the assured as to the character or effect of the statements of the application they will be regarded in do-

ing so as the agents of the insured. * * * To permit verbal testimony to show how this was done does not contradict the written contract, tho the application was signed by the party. It proceeds on the ground that it was not his statement, and that the insurance company by the acts of their agent in the matter are estopped to set up that it is the representation of the assured.' ".

In the case of GLOVER V. BALTIMORE NAT. FIRE INS. CO., 85 Fed. 125, the Court said:

"The grounds upon which the court below was moved to reject the testimony were that all conversations between the parties were merged into the written contract and that parol evidence was inadmissible to show that the intent and meaning of the parties was different from what the words of the contract expressed and authorities of commanding weight are cited to support the proposition that when a policy contains plain and unambiguous language which has a settled legal construction, neither party can by parol evidence be permitted to prove that the instrument does not mean what it says. This motion proceeded upon a misconception of the object for which the testimony was offered. It is not for the purpose of changing the terms of the contract but to show that the circumstances were such that at the time the contract was entered into the insurer actually knew all the facts relating to the risk and is estopped by such actual knowledge from setting up in avoidance of the policy either the mistake or omission to state those

facts from its face. . . . The principle does not admit oral testimony to vary or contradict that which is in writing but goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it." . . . . I May Insurance, Sec. 144, quoting from Am. Lead Cases where an application had been signed by the assured . . . This principle which seems to have the sanction of all the writers upon insurance is consonant with sound reason. All of the business of insurance is done thru agents who are presumed to know and do know better than the community at large the requirements of their companies. . . . That oral testimony may properly be offered to prove facts tending to create estoppels of this nature (estoppels in pais) is well settled in numerous cases of the highest authority. Citing Ins. Co. vs. Wilkinson, 13 Wall. 222; Eames vs. Ins. Company, 94 U. S. 621; Ins. Co. vs. Mahone, 21 Wall. 152."

In ROE vs. NATIONAL LIFE INS. CO., 137 Iowa, 696, 115 N. W. 500, it was held in an action on a life insurance policy that parol evidence was admissible to show that the agent prepared the application and represented it to accord with insurer's rules and regulations and to estop insurer from availing itself of the falsity of the statements contained therein. The Court said:

"If this association was deceived this was owing to the neglect or wrongful manner of its agent in preparing the application under the sanction of its secretary and not because of any deception practiced by the de-

ceased. For this reason the defendant is estopped from setting up the falsity of the answers in the application as a defense. Stone vs. Ins. Co. (Iowa) 28 N. W. 49; Donnely vs. Ins. Co. (Iowa), 28 N. W. 607. The above are fire insurance cases but the same rule is applicable to companies or associations insuring lives. Con. Ins. Co. vs. Chamberlain, 132 U. S. 304; Temmink vs. Ins. Co., (Mich.) 40 N. W. 469 . . . The evidence concerning the preparation of the application was received not to vary or contradict a written instrument but for the sole purpose of estopping the association from availing itself of the falsity of the statements contained therein as a defense and was admissible."

In cases of applications and agreements for insurance coverage effective immediately, the death of the applicant before policy in fact may have issued does not relieve the Company of liability.

Marderosian v. National Casualty Co., 96 Cal. App. 295, 303. 273 Pac. 1093.

Cordway v. People's Mut. Life Ins. Co., 118 Cal. App. 530, 533. 5 Pac. (2d) 453.

Meyer v. Johnson, 7 Cal. App. 2d, 604, 618; 46 Pac. (2d) 822. See also note 81 A. L. R. 332 at 336.

As to the payment of the first premium it appears that applicant paid $100.00 in cash; more than sufficient to pay on a quarterly basis to make the insurance effective immediately as intended, and that balance to be paid in

sixty days, with the agent holding himself responsible, was equivalent to cash, and so considered by the Company.

> "As between insurer and insured, although agents are forbidden by the insurer to take notes for first premiums, the taking of a note will constitute a payment thereof, where the custom or common practice is for the agent to take the note in his own name and charge it to himself in his account with the company, being responsible for its collection."

Vierra v. New York Life Ins. Co., 119 Cal. App. 352 at 360; 6 Pac. 2nd 349.

These salient facts remain; that the applicant understood and was told by the agent that he was temporarily insured; that the agent was authorized to so act; that the deceased paid sufficient premium to make the insurance effective immediately as agreed; that the agent filled in the application and the applicant signed the same without reading it, relying upon assurances and integrity of the agent; that the applicant had no notice or knowledge of any instructions to agent as to procedure or of any limitations upon the agent's authority; that the agent failed to take such action or follow such instructions as were necessary to make it effective immediately and such failure and negligence was without any fault or connivance, upon the part of the applicant.

Where such issue is directly raised, and no effort is made to deny such facts, the insurance company will not be heard to say that the deceased was not temporarily covered.

Vierra v. N. Y. Life Ins. Co., supra.

CONCLUSION.

From the foregoing facts and law it appears:

(1) That said application for insurance was solicited by an agent of the defendant company.

(2) That applicant and defendant's agent understood and agreed that the policy of insurance was to become effective immediately, provided applicant passed the necessary medical examinations. This he in fact did, and the medical department of the Home Office approved such application.

(3) That the agent had authority to state to applicant that the policy could be made effective immediately; and the Company left it to the agent to see that the proper receipt was issued.

(4) That the agent actually wrote in the answers to the questions that were answered and applicant never read or was any opportunity given or request made of him that he read the answers.

(5) That applicant offered to pay the premium necessary to make it effective immediately on a quarterly basis, and in fact paid the agent more than the amount necessary for such purpose.

(6) That it was due to the inadvertance, carelessness or neglect of agent that the requirements of the application in not filling in paragraph 14 of the application, or in not issuing proper receipt therefore were not complied with.

(7) That it was due to the carelessness and neglect

of the agent that applicant did not sign the application when first made out; and later applicant did not read the questions or answers therein when he did sign it.

(8) That applicant had no knowledge of any instructions or limitations on the agent's authority in filling in the application, issuing receipts, or other conditions imposed by the insured on making the insurance effective immediately.

(9) That the applicant did everything that was required of him in dealing with the agent, and all in his power to make the insurance effective immediately, was not guilty of any deceit or fraud.

(10) That under the business practices of defendant Company the agent Moore had been accustomed to issuing receipts in same general form as issued herein and not as required in paragraph 14, and the same had been recognized as providing insurance effective from date of application; that cash remittances and monthly settlements made not later than the 25th of each month, whereby the agent advanced necessary cash, if he had not collected full amount, were considered by the company to be full cash premium payments to make policy effective immediately.

(11) That sufficient money was paid to make the policy effective immediately upon a quarterly premium basis, and the Home Office actually approved the application as shown by indorsements on application.

(12) That under the facts and law defendant Company is estopped and cannot escape liability because of the neg-

lect or failure of the agent to comply with its instructions; and that the verdict and judgment directed for defendant herein was erroneous.

Respectfully submitted,

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